In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-689

ALEXANDER SHARP, II,
COMMISSIONER OF THE MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,
APPELLANT,

v.

CINDY WESTCOTT, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

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Jurisdictional Statement

Appellant appeals from the order of the United States District Court for the District of Massachusetts, entered on August 9, 1978, denying his motion to clarify or, alternatively, to amend its remedial order of April 20, 1978, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The District Court's opinion which accompanied its order of April 20, 1978, is not yet reported. Appellant incorporates by reference into this jurisdictional statement the copy of that opinion appended to the jurisdictional statement filed with this Court in *Califano* v. *Westcott*, No. 78-437 (September 14, 1978), which arises from the same proceeding.[1] The District Court's order of August 9, 1978, included an opinion which is not yet reported. A copy of that order is appended to this statement (State App. D, 13a-14a).[2]

Jurisdiction

On April 20, 1978, the United States District Court for the District of Massachusetts entered an order declaring unconstitutional and enjoining the enforcement of a portion of 42 U.S.C. § 607 (1970 & Supp. V 1975).[3] The Secretary of the United States Department of Health, Education, and Welfare (Secretary) and the Commissioner of the Massachusetts Department of Public Welfare (Commissioner) were defendants in that proceeding. On May 17, 1978, the Secretary filed a

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[1] This statement refers to that copy of the opinion in the following manner: (Fed. App. A, 1A-37A). Appellant incorporates this copy by reference in reliance upon the advice of the Office of the Clerk and U.S. Supreme Court Rule 15(3).

[2] The alphabetical designation of the appendices contained within this statement reflects the chronology of the proceedings below. References to the other appendices contained within this statement follow this form.

[3] This statement incorporates by reference the copy of that initial order appended to the jurisdictional statement filed in *Califano* v. *Westcott*, No. 78-437. This statement refers to that copy of the order as (Fed. App. B, 39A-42A).

notice of his appeal to this Court from that order pursuant to 28 U.S.C. § 1252 (1976).

The District Court's initial order also required the Commissioner to reformulate the public assistance program established by 42 U.S.C. § 607 in order to correct its underinclusiveness (Fed. App. B, 40A-42A). After the Commissioner tentatively indicated how he might extend the program, the District Court observed that its original order did not contain any language authorizing the Commissioner's proposal.[4]

On June 7, 1978, the Commissioner filed a motion to clarify or, alternatively, to amend the District Court's order of April 20, 1978, in order to obtain a definitive ruling from the District Court on whether his plan was a permissible remedy for the statutory defect (State App. B, 3a-11a). On August 9, 1978, the District Court denied the Commissioner's motion on its merits (State App. D, 13a-14a). On August 24, 1978, the Commissioner filed a notice of his appeal from this final order to this Court pursuant to 28 U.S.C. § 1252 (1976) (State App. E, 15a).

Where one party has previously appealed to this Court pursuant to 28 U.S.C. § 1252 from a decision holding an act of Congress unconstitutional, section 1252 provides that:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court.

Cases supporting this Court's jurisdiction include *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975), and *United States* v. *Raines*, 362 U.S. 17 (1960).

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[4] The District Court's observation was set forth in its order of May 31, 1978 (State App. A, 1a-2a).

Statutory Provision Involved

Section 407 of the Social Security Act, 42 U.S.C. § 607 (1970 & Supp. V 1975), is appended to the Secretary's jurisdictional statement in *Califano* v. *Westcott*, No. 78-437.[5]

Question Presented

Whether the District Court erred as a matter of remedy when it ordered that public benefits which had previously been available to a two-parent family if the father were unemployed must be extended to such families if either parent were unemployed, thereby rejecting the more limited extension of benefits to only those families whose principal wage-earner was unemployed.

Statement

The Social Security Act of 1935 (Act) established the Aid for Families with Dependent Children (AFDC) program, as it is now known, to provide financial assistance to families whose children were needy because of the death, absence or incapacity of a parent. 42 U.S.C. §§ 601 *et seq.* (1970 & Supp. V 1975) (originally enacted by 49 Stat. 627-629 [1935]). The Congressional purpose behind the AFDC program was to have the federal and state governments assume financial responsibility for "children in families without a 'breadwinner,' 'wage

[5]This statement incorporates that copy by reference as (Fed. App. D, 45A-48A).

earner,' or 'father,'" *King* v. *Smith*, 392 U.S. 309, 328 (1968), in order "to allow widows and divorced mothers to care for their children at home without having to go to work." *Batterton* v. *Francis*, 432 U.S. 416, 418 (1977). If the Secretary determines that the plan of a state electing to participate in the AFDC program meets the standards set forth in 42 U.S.C. § 602 (Supp. V. 1975), that state can receive partial federal reimbursement for both the cost of the benefits which it provides and its administrative costs. 42 U.S.C. § 603 (1970 & Supp. V 1975). If a state also elects to participate in the medical assistance (Medicaid) program established under the Act, individuals receiving AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. § 1396(a)(10) (Supp. V 1975).

In 1961, Congress expanded the AFDC program "to assist children who are needy simply because the family breadwinner is unable to find work." *Batterton* v. *Francis*, 432 U.S. 416, 419 (1977).[6] Congress did so by adding section 407 to the Act. 75 Stat. 75 (1961). As subsequently amended by 81 Stat. 882 (1968), section 407 redefined the class of eligible families to include those whose children were needy simply because of their father's unemployment.[7] This supplementary component of the AFDC program is known as the Aid to Families with Dependent Children, Unemployed Father (AFDC-UF) program. All requirements of the AFDC program (other than the requisite death, absence, or incapacity of a parent) apply to the AFDC-UF program.[8] Along with approximately one-

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[6] *See* H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 1 (1961).

[7] This Court has reviewed the development of the AFDC-UF program in *Philbrook* v. *Glodgett*, 421 U.S. 707, 709-711 (1975), and *Batterton* v. *Francis*, 432 U.S. 416, 419-420 (1977).

[8] In short, AFDC-UF provides to certain intact (*i.e.*, two-parent) families what AFDC provides to families with only one parent in the home. For pur-

half of the states,[9] Massachusetts has elected to participate in the AFDC-UF program.[10] In conformity with section 407, Massachusetts has defined eligibility for its AFDC-UF program in terms of the unemployment of the father.[11]

In January, 1977, plaintiffs filed this class action in the United States District Court for the District of Massachusetts asserting that section 407 and the implementing state regulations violated *inter alia* their equal protection rights under the Fifth Amendment's Due Process Clause and the Fourteenth Amendment. Plaintiffs argued that the statutory classification was fatally underinclusive because it failed to provide AFDC-UF benefits on the basis of the mother's unemployment to a family which was otherwise identical to an eligible family. The complaint sought declaratory and injunctive relief against the continued enforcement of section 407 and the state regulations (Fed. App. A, 1A-3A).

Plaintiffs moved for certification of their class and for summary judgment on their federal constitutional claim (Fed. App. A, 1A-4A). The Secretary opposed their summary judgment motion on the merits, but at the same time argued that the proper remedy, should one be needed, was to extend, rather than strike down, the AFDC-UF program. The Commissioner adopted the Secretary's arguments in defense of section 407, and went on to argue independently in favor of extension rather than invalidation of the AFDC-UF program. On April 20, 1978, the District Court certified a class consisting of all families within Massachusetts which would be eligible for

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poses of AFDC eligibility, an incapacitated parent is one whose physical or mental ability to provide parental care has been substantially reduced. 45 C.F.R. § 233.90(c)(1)(iv).

[9] *Batterton* v. *Francis*, 432 U.S. 416, 420 (1977).

[10] See 6 Mass. CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01, 303.04.

[11] 6 Mass. CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.01.

the AFDC-UF program but for the program's exclusion of families in need because of the mother's unemployment (Fed. App. A, 11A-19A; Fed. App. B, 39A-40A). Ruling that the statutory classification was invalid as underinclusive (Fed. App. A, 19A-33A), the District Court selected the extension of the AFDC-UF program as its remedy (Fed. App. A, 34A-37A). The District Court enjoined the Commissioner "from refusing to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits to families deprived of support or care because of the unemployment of the father . . ." (Fed. App. B, 41A-42A). The District Court also enjoined the Secretary from the enforcement of section 407 "insofar as it prohibits defendant Califano from approving a Massachusetts plan or federal matching funds for Massachusetts to pay AFDC or Medicaid benefits to families deprived of support or care due to the unemployment of the mother" (Fed. App. B, 40A-41A). The effect of these orders was to require the Commissioner rather than the Secretary to design a valid sex-neutral AFDC-UF program.

On May 10, 1978, the Commissioner moved for a partial stay of the court's initial order to allow him to develop and implement a plan for compliance with that order. In that motion, he indicated his intention to consider whether the unemployment of a family's principal wage-earner could validly become the standard of eligibility in a sex-neutral AFDC-UF program. While granting the requested stay, the District Court pointed out in its order of May 31, 1978, that its original order did not "contain any language which authorizes the imposition of . . . a primary wage earner limitation . . . on the awarding of AFDC-UF and/or Medicaid benefits by the defendant Sharp" (State App. A, 2a). In order to resolve whether the incorporation of a principal wage-earner standard

was consistent with section 407, the Commissioner then moved the District Court to clarify or, alternatively, to amend its initial order so as to permit the provision of AFDC-UF benefits only to families with children deprived of parental support by the principal wage-earner's unemployment (State App. B, 3a-11a). Plaintiffs opposed this motion. On July 19, 1978, the District Court extended its stay of its initial order so that it could give further consideration to the Commissioner's motion. It also permitted the parties to submit further documents supporting their respective positions on the principal wage-earner issue (State App. C, 12a). Plaintiffs argued that, as the father's unemployment had previously been sufficient to establish eligibility, the mother's unemployment should similarly be sufficient to establish eligibility under a sex-neutral AFDC-UF program regardless of the father's concurrent employment. The Secretary remained silent on this issue.

On August 9, 1978, the District Court denied the Commissioner's motion to clarify or, alternatively, to amend its order of April 20, 1978. Its reasons were that: (1) any reformulation of the AFDC-UF program that would go beyond its initial order should be left to Congress, and (2) it could not authorize Massachusetts to narrow the federal standard of eligibility for the AFDC-UF program (State App. D, 13a-14a). By its refusal to adopt a principal wage-earner standard, the District Court necessarily approved the remedy advanced by the plaintiffs. Accordingly, on August 24, 1978, the Commissioner filed his notice of appeal (State App. E, 15a).

The Question is Substantial

This appeal presents a narrow but significant issue of remedy. Full consideration of the merits of this appeal will

not prove burdensome because this Court must, in any event, review the role that sexual identity plays within the structure and function of section 407 in order to dispose of the Secretary's appeal. If this Court chooses to accept briefs and oral argument on section 407's constitutionality in *Califano* v. *Westcott*, No. 78-437, it should, therefore, also give plenary consideration to this appeal in order to review the full scope of the District Court's decision.[12]

The extension of the AFDC-UF program which the District Court approved as the remedy for section 407's underinclusiveness is overly broad and impinges upon the legislative prerogative of Congress. While extension may properly provide an alternative to invalidation as a remedy for underinclusiveness,[13] the judiciary must always proceed within the channel markers established by the legislative history and the statutory framework of the defective classification. Particularly in the area of sex discrimination, where this Court has emphasized the subtle significance of statutory context,[14] a lower court's

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[12] In his jurisdictional statement filed in *Califano* v. *Westcott*, No. 78-437, the Secretary stated that he does not challenge the District Court's remedy. *Id.*, 6 at n. 5. While indicating some uncertainty as to what that remedy is, the Secretary's waiver of any challenge to the remedy confirms that this Court can only ensure full review of that issue by giving plenary consideration to the Commissioner's appeal.

[13] *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). *See generally* Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. and Soc. Probs. 115 (1975).

[14] *E.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting) (cases employing heightened levels of scrutiny should not be uncritically carried over into the field of social insurance); *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) (where this Court rejected an equal protection challenge to a state insurance program excluding coverage of disabilities attributable to normal pregnancies on the ground that its limited coverage did not favor one sex over the other). *See also Califano* v. *Webster*, 430 U.S. 313 (1977), *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), and *Kahn* v. *Shevin*, 416 U.S. 351 (1974), where this Court upheld gender-based discrimination against

sweeping exercise of the exceptional power of judicial extension merits plenary review. Proper judicial deference to the acts of Congress permits no less. While the District Court declined to adopt the narrow extension of the AFDC-UF program advocated by the Commissioner on the ground that any reformulation of the program going beyond its initial order should be left to Congress (State App. D, 13a), the broader extension which it thereby sanctioned decisively impinges upon the Congressional prerogative. The District Court thus honored the principle of judicial deference to Congress in the breach.[15]

By giving plenary consideration to this appeal, this Court will preserve the option of forging a moderate remedy on a middle ground between upholding the constitutionality of section 407, as the Secretary requests, and the open-ended expansion of the AFDC-UF program that plaintiffs advocate. While the Solicitor General's arguments in support of the constitutionality of the AFDC-UF program deserve attention, only the Commissioner's arguments defining the proper corrective for section 407's underinclusiveness will raise for decision the difficult remedial issues which permeate this case. In short, should this Court give plenary consideration to the Secretary's appeal, this Court's appellate role would be best served through commensurate review of the Commissioner's appeal.

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men in light of the respective statutes' goal of assisting women in overcoming the barriers which past sexist practice had imposed on them.

[15] The other ground for the District Court's order of August 9, 1978, reflects a miscomprehension of the Commissioner's position on the proper form of extension (State App. D, 13a). Contrary to the District Court's suggestion, the Commissioner did not below and does not now argue that Massachusetts can impose additional limitations on the AFDC-UF program beyond those established by federal law. The Commissioner argues, rather, that the legislative history and statutory structure of section 407 require — or at least permit — the sex-neutral form of the AFDC-UF program to condition eligibility upon the status of the family's principal wage-earner.

The Commissioner's motion to clarify or, alternatively, to amend the District Court's order of April 20, 1978, presented a single question: whether the legislative history and statutory framework of the AFDC-UF program dictated the replacement of the invalid term "father" by a sex-neutral reference to the family's principal wage-earner as the parent whose unemployment can establish eligibility under section 407 (State App. B, 3a-5a).[16] Two principles of the federal common law of remedies govern the answer to that question. First, the judiciary may extend a statutory classification to cure its underinclusiveness only where Congress would itself have elected to do so. The judiciary's power is limited to rendering "what Congress plainly did intend . . . constitutional."[17] The critical judicial inquiry in this regard is what form of a sex-neutral AFDC-UF program, if any, would Congress have established if it had known of section 407's constitutional defect when it

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[16] This jurisdictional statement focuses on whether the history and structure of section 407 require the incorporation of a principal wage-earner standard into a sex-neutral AFDC-UF program. The Commissioner reserves the question whether section 407 might permit the Secretary to promulgate such a standard as a matter of administrative discretion for argument in his brief on the merits. *See* U.S. Supreme Court Rule 15(1)(c). In his jurisdictional statement in *Califano* v. *Westcott*, No. 78-437, the Secretary's characterization of the District Court's remedy implies that he views the proper form of a sex-neutral AFDC-UF program to remain subject to his discretion. He observes that:

> [T]he remedy . . . apparently leaves the Secretary free to redefine "unemployment" by regulation in any gender-neutral way . . ..

Id., 6 at n. 5. This remark does not, however, reveal the Secretary's position on how to define the parent whose unemployment can establish a family's eligibility.

[17] *Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J., concurring).

enacted that statute.[18] Second, the judiciary may "hazard the necessary statutory repairs [only] if they can be made within the administrative framework of the statute and without impairing other legislative goals . . .."[19] In sum, the Congressional intent underlying a statutory classification and its administrative structure determine the form which judicial extension must take.

I. Section 407's Legislative History Demonstrates the Propriety of a Principal Wage-Earner Standard for Eligibility.

The legislative history behind the enactment of section 407 by 75 Stat. 75 (1961) is undisputed. Congress intended to expand the existing AFDC program to cover families with dependent children rendered needy by the unemployment of the family "breadwinner."[20] Congress' use of this term reveals the governing legislative intent behind section 407. The "breadwinner" is that "member of a family or household whose wages solely or largely defray its living expenses."[21]

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[18] *See* Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. and Soc. Probs. 115, 121-122 (1975).

[19] *Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J., concurring).

[20] *See* H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 1 (1961) (the reason given for expanding the AFDC program was "to include families in which the breadwinner is unemployed"). *See also Batterton* v. *Francis*, 432 U.S. 416, 419 (1977). The District Court recognized this Congressional focus upon unemployed "breadwinners" (Fed. App. A, 24A-25A). *See also Stevens* v. *Califano*, 448 F. Supp. 1313, 1320 (N.D. Ohio 1978). The *Stevens* case involved an equal protection challenge to the AFDC-UF program identical to that raised by plaintiffs in this case. The rulings in the *Stevens* decision followed those in this case on both the constitutional and remedial issues.

[21] Webster's Third New International Dictionary (1964).

The District Court appropriately analyzed the import of this feature of section 407's legislative history when it observed that:

> The legislators at times during the Congressional debates used the term "father" interchangeably with the terms "breadwinner," "worker" and "wage earner." This usage apparently reflected their belief that the father is generally the *primary wage earner* of the family and the mother the "homemaker."[22]

The term "breadwinner" thus denotes a status which only one member of a family can hold at a given time.

In 1968, Congress confirmed that the AFDC-UF program was limited to families in which the breadwinner was unemployed. It amended section 407, which had since 1961 conditioned eligibility upon the unemployment of a "parent," by 81 Stat. 882 (1968) so as to make the unemployment of the "father" the prerequisite to eligibility for the AFDC-UF program.[23] This gender-based restriction on eligibility must be recognized for what it was, an effort to condition eligibility

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[22] Fed. App. A, 24A at n. 15 (emphasis added).

[23] The Congressional reports concerning this amendment uniformly stated that:

> This program was originally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply only to the children of unemployed fathers.

H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967).

upon the unemployment of a family's principal wage-earner whom Congress broadly assumed to be the father.[24]

This legislative history demonstrates that Congress never intended to allow either parent's unemployment to establish a family's eligibility regardless of the other parent's employment status at that time.[25] Adoption of this dual-parent model of the AFDC-UF program, which plaintiffs advocated below and which the District Court's final order sanctioned, would grossly increase the scope and cost of the AFDC-UF program beyond what Congress envisioned. By restricting the eligibility of intact families to those whose "breadwinner" was unemployed, Congress expressly conditioned eligibility upon the status of a specific parent within the family. This commitment to a single-parent model is the dominant element in the legislative history of the AFDC-UF program.

A sex-neutral extension of the AFDC-UF program to allow unemployed mothers to establish their families' eligibility should follow the single-parent model.[26] A principal wage-

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[24] In *Stevens* v. *Califano*, 448 F. Supp. 1313, 1320 (N.D. Ohio 1978), the District Court observed that:

> The purpose of the amendment to Section 607 . . . was to eliminate benefits to families in which the breadwinner was fully employed.

In the welfare area, Congress has commonly assumed that the father is the breadwinner. *See* Griffiths, *Sex Discrimination in Income Security Programs*, 49 Notre Dame Lawyer 534, 541 (1974).

[25] In *Stevens* v. *Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), the District Court recognized AFDC-UF to be "a program which Congress intended as aid to needy families *in which both parents were unemployed.*" *Id.*, 1323 at n. 11 (emphasis added).

[26] While this jurisdictional statement refers solely to the criterion of unemployment, it includes within such references the other criteria for eligibility established by 42 U.S.C. § 607 (1970 & Supp. V 1975) and 45 C.F.R. 233.100.

earner standard for eligibility would implement the single-parent model in an appropriately sex-neutral manner.[27]

II. Section 407's Structure Substantiates the Correctness of a Principal Wage-Earner Standard for Eligibility.

An analysis of the administrative framework of section 407 confirms the excessive sweep of the District Court's dual-parent model of the AFDC-UF program as a corrective to its gender-based defect.[28] Under section 407, a family must meet both categorical and financial requirements for eligibility. The major categorical requirement is that the father must be employed for less than 100 hours per month.[29] The financial requirement is that the family's income may not exceed the AFDC standard of need.[30]

The single-parent model retains the major categorical requirement by conditioning eligibility upon the principal wage-

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[27] As an appendix to his motion to clarify or, alternatively, to amend the court's order of April 20, 1978, the Commissioner attached a proposed amendment to the state AFDC-UF regulations which defined the eligibility requirement in terms of deprivation caused by the unemployment of the family's principal wage-earner. In pertinent part, the proposed amendment defined the principal wage-earner to be that parent whose income was greater during the six months preceeding the month of application, reapplication or redetermination of eligibility (State App. B, 6a-11a).

[28] The District Court's remedial powers were limited by the principle that the judiciary may "hazard the necessary statutory repairs [only] if they can be made within the administrative framework of the statute and without impairing other legislative goals." *Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J., concurring).

[29] 42 U.S.C. § 607(a) (1970); 45 C.F.R. § 233.100(a)(1)(i).

[30] 45 C.F.R. § 233.100(a)(1). Participating states are allowed to determine the standard of need for their respective AFDC programs. *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974).

earner's being employed less than 100 hours per month. The dual-parent model removes the categorical requirement, retaining only the income test. It thus allows families to maintain eligibility longer than does the single-parent model, if not indefinitely, through the following arrangement. Whenever the parent whose unemployment originally established the family's AFDC-UF eligibility becomes employed for 100 or more hours per month, the other parent can then maintain the family's eligibility on the basis of his or her present unemployment.[31] This revolving arrangement is capable of indefinite repetition, as, for example, among families whose parents are chronically subject to intermittent unemployment. Such a family would lose its eligibility for AFDC-UF only (1) if its income as reduced by the federal income disregards[32] and work-related expenses[33] were to exceed the maximum allowable income, or (2) if both parents began to work for 100 or more hours per month. The dual-parent model thus far exceeds Congress' original vision of the AFDC-UF program as a temporary supplement to families whose breadwinners had been laid off in the course of an economic recession.[34]

The dual-parent model of the AFDC-UF program would provide an income subsidy to the working poor.[35] With the re-

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[31] This sketch again simplifies the criteria established by section 407 for ease of presentation. If the second parent is unable to meet any of the other criteria, *e.g.*, having earned fifty dollars or more in six calendar quarters within any thirteen-calendar-quarter period ending within one year of the date of the family's redetermination or reapplication, that parent will not be able to maintain the family's eligibility.

[32] 45 C.F.R. § 233.20(a)(11).

[33] 45 C.F.R. § 233.20(a)(7)(ii).

[34] *See* H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961).

[35] The District Court in *Stevens* v. *Califano*, 448 F. Supp. 1313, 1320 (N.D. Ohio 1978), recognized from its review of the legislative history that:

> It is clear . . . that Congress did not intend the AFDC-UF program to provide aid for working poor.

moval of the major categorical requirement, the current AFDC earnings disregard formula would allow a recipient family to remain eligible until, by the Commissioner's estimate, its gross income reached the following levels:

	Number of Family Members						
Maximum Earnings	3	4	5	6	7	8	9
Weekly	$235	$276	$317	$357	$398	$438	$479
Annually	$12,220	$14,360	$16,470	$18,580	$20,690	$22,800	$24,910

The dual-parent model would thus supplement the income of a large number of intact families that are not needy by conventional standards. Under the existing AFDC-UF program, the Commissioner has found that a family's eligibility terminates more often for categorical than financial reasons. The dual-parent model's elimination of section 407's major categorical requirement as a source of attrition would swell the size of the AFDC-UF caseload and the cost of the program.

III. The District Court Improperly Failed to Assess the Comparative Cost of the Alternative Remedies as an Index of How Congress Would Itself have Chosen to Correct Section 407's Underinclusiveness.

The District Court failed to consider the cost differential between the single-parent and the dual-parent models of the AFDC-UF program as an index to Congressional intent in its

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That court then proceeded to adopt the dual-parent model of the AFDC-UF program on the incongruous ground *inter alia* that any other remedy fell within the province of Congress. *Id.*, 1323 at n. 11.

selection of a remedy for section 407's underinclusiveness.[36] As set forth in affidavits filed in the District Court, the Commissioner estimates that the net incremental costs to Massachusetts of the dual-parent and single-parent models for the first year of operating an extended AFDC-UF program would respectively be $3,525,000 and $945,000.[37] The dual-parent model would thus cost Massachusetts $2,580,000 more than the single-parent model in the first year.[38] The significance of this difference can be gauged from Massachusetts' net annual expenditure for AFDC benefits provided to its AFDC-UF caseload prior to April 20, 1978, which was approximately $15,000,000. The dual-parent model's omission of section 407's major categorical requirement would, moreover, necessarily produce an increasing discrepancy between its cost and that of the single-parent model in succeeding years. The dual-

[36] *See* Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. and Soc. Probs. 115, 134 (1975). When considering whether to extend an underinclusive statute, federal courts have often considered the incremental costs associated with its extension. *E.g.*, *Jablon* v. *Secretary of H.E.W.*, 399 F. Supp. 118, 132 (D. Md. 1975), *aff'd*, 430 U.S. 924 (1977); *Moreno* v. *U.S. Department of Agriculture*, 345 F. Supp. 310, 315-316 (D. D.C. 1972), *aff'd*, 413 U.S. 528 (1973). In *Jablon*, the District Court decided to extend the statute on the ground that to require wives as well as husbands to demonstrate dependency would be more costly for administrative reasons than enjoining the enforcement of the requirement that husbands must demonstrate dependency. In *Moreno*, the court chose to extend the statute because extension would not require "the expenditure of public funds to a greater extent than now authorized." 345 F. Supp. at 316.

[37] These figures state the cost of both AFDC and Medicaid benefits after reimbursement at the approximate rate of 50 per cent by the federal government pursuant to 42 U.S.C. § 603.

[38] When multiplied by the AFDC-UF programs operating in approximately twenty-five other states, this comparative figure becomes a substantial factor in the resolution of this remedial issue. In his jurisdictional statement in *Califano* v. *Westcott*, No. 78-437, p. 7 at n. 6, the Secretary gave the figure of $510,700,000 for the estimated additional cost of the AFDC-UF program to the federal and state governments in the first year of assisting families in which the mother but not the father is unemployed.

parent model allows many more families to establish eligibility in the first instance; it also has a lesser capacity to reassess a recipient family's eligibility in light of shifting employment conditions.

When considering the extension of an underinclusive classification, the judiciary should recall the legitimate importance which Congress places upon the fiscal integrity of federal-state welfare programs.[39] In *Quern* v. *Mandley*, 98 S. Ct. 2068 (1978), this Court rejected a challenge to a state emergency assistance program which allegedly limited eligibility more narrowly than did the governing federal statute. It declined to impute to Congress the intention to create "an entirely open-ended program not susceptible of meaningful fiscal or programmatic control by the States."[40] The comparative incremental cost of the single-parent and dual-parent models indicates that Congress would have enacted the less expensive form of a sex-neutral AFDC-UF program if it had itself been called upon to remedy the underinclusiveness.

This analysis of Congress' fiscal concern is consistent with the legislative history of section 407 and its administrative framework. Whether taken together or separately, these three factors demonstrate that a sex-neutral AFDC-UF program should incorporate the eligibility requirement that the family's principal wage-earner must be unemployed.

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[39] *E.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970).

[40] *Quern* v. *Mandley*, 98 S. Ct. 2068, 2080 (1978).

Conclusion

For the reasons set forth above, the Court should note probable jurisdiction of this appeal and set the case for argument.

Respectfully submitted,

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October 23, 1978

Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CINDY AND WILLIAM WESTCOTT ET AL.

v.

CIVIL ACTION
No. 77-222-F

JOSEPH A. CALIFANO ET AL.

Order.

May 31, 1978.

FREEDMAN, D.J.

On May 15, 1978, in the above-entitled action, the state defendant, Alexander Sharp, requested a stay of this Court's Order of April 20, 1978 pending implementation of defendant Sharp's plan for compliance with that Order. This Court believes that defendant Sharp's request for a stay involves a reasonable period of time for the state defendant to fully comply with the Order of April 20, 1978. The Court, therefore, allows defendant Sharp's motion for this Court to stay that portion of its Order of April 20, 1978 which ordered that:

> the operation or enforcement of the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04, by the defendant, Alexander Sharp, Commissioner of the Massachusetts Department of Public Welfare, is enjoined insofar as it prohibits defendant Sharp from granting AFDC and Medicaid to families with children deprived of support or care

> because of the unemployment of the mother; and that defendant Sharp is enjoined from refusing to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits to families with children deprived of support or care because of the unemployment of the father in accordance with the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04.

The stay shall remain in effect until August 1, 1978, unless the defendant Sharp informs this Court at an earlier time that he is in full compliance with the above quoted portion of the Court's Order of April 20, 1978. During the period when the stay is in effect, the state defendant is ordered to identify and keep records of all members of the plaintiffs' class who have applied for AFDC-U and/or Medicaid benefits on or after April 20, 1978, so that their eligibility for benefits may be determined and appropriate benefits provided immediately upon expiration of the stay.

The Court wishes to point out at this time that the Court's Order of April 20, 1978 does *not* contain any language which authorizes the imposition of additional limitations, including a primary wage earner limitation, on the awarding of AFDC-U and/or Medicaid benefits by the defendant Sharp under the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04.

This Court will look with disfavor upon any further motions in this action to extend the length of the stay.

FRANK H. FREEDMAN,
United States District Judge.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CINDY AND WILLIAM
WESTCOTT, ET AL.,
PLAINTIFFS

v.

CIVIL ACTION
No. 77-222-F

JOSEPH A. CALIFANO,
ET AL.,
DEFENDANTS

Defendant Sharp's Motion to Clarify or, Alternatively, to Amend the Court's Order of April 20, 1978.

Defendant Sharp moves that the Court clarify or, alternatively, that it amend its order of April 20, 1978, such that it allows the Department of Public Welfare of the Commonwealth of Massachusetts (Department) to provide AFDC-U benefits only to those families where needy children have been deprived of parental support or care by the unemployment of the family's principal wage-earner in accordance with the Department's proposed regulation, which is attached as Appendix A. In support of this motion, defendant Sharp states that the Court must, if it is to adhere to the legislative intent which underlies 42 U.S.C. § 607 (West Supp. III 1977), balance its extension of the AFDC-U program on a sex-neutral basis through allowance of a corresponding requirement that only the unemployment of the family's principal wage-earner can establish eligibility under the extended AFDC-U program. As

the Court's Opinion of April 20, 1978, in this action recognizes at pages 23-24, Congress established the AFDC-U program to protect those needy children deprived of parental support by the unemployment of the family's breadwinner or primary wage-earner.

In further support of this motion, defendant Sharp states that a sex-neutral AFDC-U program which does not restrict eligibility to families where the primary wage-earner is unemployed would generate a total annual cost within Massachusetts of $23,000,000 in addition to the existing annual cost of the AFDC-U caseload prior to April 20, 1978. If the Department may restrict eligibility to cases involving the unemployment of the principal wage-earner, the total annual increment in the cost of the AFDC-U program would be approximately $3,300,000. An analysis of these estimated cost figures is set forth in the Affidavit of Jenny Netzer in Support of Defendant Sharp's Motion to Clarify or, Alternatively, to Amend the Court's Order of April 20, 1978 (Netzer Affidavit), which is filed herewith.

Pursuant to Local Rule 12(a)(3) of the United States District Court for the District of Massachusetts, defendant Sharp requests leave of the Court to serve his memorandum in support of this motion by June 15, 1978. Pursuant to Local Rule 12(c)(1), defendant Sharp requests an opportunity for oral argument in support of this motion. Resolution of the issue raised by this motion involves fundamental questions of statutory construction as well as financial considerations of enor-

mous magnitude to the federal and state governments. One hour will be necessary for all parties to be heard.

By his attorney,

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Dated: June 7, 1978

ATTACHMENT A.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE
600 Washington Street, Boston 02111

ALEXANDER E. SHARP
Commissioner

June 1, 1978

To: Department Staff

From: Alexander E. Sharp, Commissioner

Re: *AFDC — Unemployed Parent — Principal Wage Earner*

This letter transmits material for the AP policy manual concerning eligibility for AFDC of children who are deprived of parental support or care by reason of the unemployment of the natural or adoptive father or mother who is the family's principal wage-earner and with whom the children reside.

This material is effective

PEN AND INK REVISIONS

AP Manual. (6 CHSR III), Subchapter A

The following sections are revised by changing the word "father" to "parent" in the text and a similar change is to be made in any other manual sections which refer to "unemployed father": Sections 301.03, 301.05, 303.05, 303.11, 303.62, 303.64, 303.66, 303.86.

NEW AND REVISED MATERIAL

AP Manual, (6 CHSR III), Subchapter A

Part 303, Subpart A, Sections 303.01 and 303.04

OBSOLETE MATERIAL

AP Manual, (6 CHSR III), Subchapter A

Part 303, Subpart A, Section 303.01 — Trans. by S.L. 435
Section 303.04 (2 pages) — Trans. by S.L. 407

State Letter

Section 303.01 — *Deprivation of Parental Support or Care* is revised as follows:

A child must be deprived of the support or care of the natural or adoptive father or mother, whether or not the parents are married to each other. "Deprivation" exists because of:

(A) death of the father or mother
(B) physical or mental incapacity of the father or mother
(C) continued absence from home of the father or mother
(D) unemployment of the family's principal wage-earner

The principal wage-earner is defined as the parent (natural or adoptive father or mother) whose earned income or Unemploy-

ment Compensation was greater during the six (6) calendar months preceeding the month of application, reapplication or redetermination of eligibility. If neither parent worked or received UC during the previous six (6) months, the principal wage-earner is defined as the parent who earned more or received more UC during the period set forth in Section 303.04 - (E).

Section 303.04 — *Unemployed Father* is revised as follows:

303.04 *Unemployment of Principal Wage-Earner*

AFDC is available to a child(ren) deprived of parental support because of the unemployment of the natural or adoptive parent who is the family's principal wage-earner and with whom the child(ren) resides. The parent must meet the following conditions:

(A) Is currently unemployed (or is employed less than 100 hours a month) and has been unemployed (or was employed less than 100 hours) for at least 30 days prior to the receipt of AFDC, except as provided in the Work Experience Program, Section 303.86.

A parent who has worked a total number of hours that is less than 100 hours in the 30 day period prior to AFDC-UF eligibility meets the standard regardless of whether or not he may have been employed full time at

some point during this 30 day period. For example, a parent might have two weeks of full time employment (amounting to 80 hours) and then two weeks of total unemployment (amounting to zero hours), and the total hours worked would be less than 100.

The standard of 100 hours a month may be exceeded for a particular month if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the two (2) prior months and is expected to be under the standard during the next month.

NOTE: Date of eligibility of AFDC will be the thirty-first day of unemployment or underemployment.

(B) Has applied for any unemployment compensation (UC) benefits to which he may be entitled. The UC benefits when received must be deducted from the AFDC grant. (See Section 303.58 regarding retroactive UC benefits)

(C) Has not refused without good cause a bona fide offer of suitable employment or training for employment within thirty (30) days prior to eligibility for AFDC-UF.

Before it is determined that a parent has refused a bona fide offer of employment or training for employment

without good cause, the worker must first make a determination that such an offer was actually made.

When a job is a bona fide offer made directly by an employer, the determination of good cause is to be made by the worker. In making this determination, the worker shall give consideration to such factors as the ability and physical capacity of the individual to do the job; transportation problems to and from the job; applicable minimum wages; risks to health, safety or lack of workmen's compensation protection or other factors that would make refusing a job reasonable.

The determination as to whether an offer was bona fide or whether there was good cause to refuse an offer made through DES will be made by that agency.

(D) Is registered with the WIN program

(a) *Initial Registration*

WIN registration is verified by the applicant's WIN Referral and Registration form (WIN #1) signed by the DES/WIN interviewer.

(b) *Current Registration*

Registration for WIN services shall be current in ongoing AFDC-UF cases provided that the unemployed parent has not been WIN Deregistered.

(E) The unemployed parent must fall into one of the following categories in order to be eligible:

(a) Has six or more quarters of work in which he received earnings of not less than $50.00 in each quarter, or participated in a community work and training program or under the Work Incentive Program in any 13 calendar-quarter period ending within one year prior to the application for AFDC; or

(b) Received UC under an unemployment compensation law of any state or of the United States at sometime during the year prior to application for AFDC; or

(c) Was qualified to receive UC under a UC law of any state or of the United States sometime during the year prior to application for AFDC but did not apply for UC; or

(d) Performed work not covered by UC, which if covered would have created eligibility for UC within one year prior to the application for AFDC.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CINDY AND WILLIAM WESTCOTT ET AL.

v.

CIVIL ACTION
No. 77-222-F

JOSEPH A. CALIFANO ET AL.

Order.

July 19, 1978.

FREEDMAN, D.J.

The motion of the state defendant Sharp for extension of the Court's stay of its Order of April 20, 1978 with respect to those families where one person remains employed for 100 or more hours per month, which motion was filed on July 7, 1978, is hereby ALLOWED.

With respect to the state defendant's motion to clarify or modify the Court's Order of April 20, 1978, filed on June 7, 1978, the Court hereby takes same under advisement. All parties are hereby given an additional ten (10) days from this date to submit any further memoranda or supporting documents. The Court intends to rule on this motion at an early date.

FRANK H. FREEDMAN,
United States District Judge.

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CINDY AND WILLIAM WESTCOTT ET AL.

v.

CIVIL ACTION
No. 77-222-F

JOSEPH A. CALIFANO ET AL.

Order.

August 9, 1978.

FREEDMAN, D.J.

Having considered the memoranda and relevant supporting papers submitted by the parties in the above entitled action, this Court hereby denies the motion of the state defendant Alexander Sharp "to clarify or, alternatively, to amend the Court's order of April 20, 1978," which motion was filed on June 7, 1978.

I believe that any reformulation of the statutory scheme embodying the AFDC-U program, which goes beyond the remedy already ordered in this case, is properly left to Congressional action. *See Stevens* v. *Califano*, No. 77-103A, slip op. at 23 n. 11 (N.D. Ohio, April 19, 1978). Furthermore, the United States Supreme Court has most recently reiterated the principle that "states are not free to narrow the federal standards that define the categories of people eligible for aid" under the AFDC program, *Quern* v. *Mandley*, 46 U.S.L.W. 4594, 4598

(U.S. June 6, 1978).[1] This Court, therefore, cannot authorize the imposition of an eligibility criterion, such as a primary wage earner criterion, on the awarding of AFDC-U and/or Medicaid benefits by the defendant Sharp under the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04.

It is so ordered.

FRANK H. FREEDMAN,
United States District Judge.

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[1] The Court indicated, albeit by way of implication, that the optional AFDC-U program is to be treated in the same way as the AFDC program at least with respect to the application of this principle. *See Quern* v. *Mandley*, *supra* at 4599 & n. 18.

Appendix E.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CINDY AND WILLIAM WESTCOTT, ET AL.,
PLAINTIFFS

v.

CIVIL ACTION
No. 77-222-F

JOSEPH A. CALIFANO, ET AL.,
DEFENDANTS

Notice of Appeal.

Defendant Sharp gives notice of his appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252 and 2101 from the Order of the District Court entered in this action on August 9, 1978.

By his attorney,

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Dated: August 23, 1978